

Title 38 Decision Paper
Department of Veterans Affairs (VA)

FACTS

The Department of Veterans Affairs (VA) is comprised of three administrations: the Veterans Health Administration (VHA); the Veterans Benefits Administration (VBA); and the National Cemetery Administration (NCA). (Attachment A). VA is the second largest Federal Department and has a workforce of approximately 351,540 full-time employees. *Id.* At present, the VA employs approximately 108,606 Title 38 personnel appointed under 38 U.S.C. § 7401(1).¹ (Attachment B). VHA is America's largest integrated health care system, providing care at 1,255 health care facilities, including 170 medical centers and 1,074 outpatient sites of care of varying complexity (VHA outpatient clinics), serving 9 million enrolled Veterans each year. (Attachment C).

On March 15, 2011, a Master Collective Bargaining Agreement (2011 VA-AFGE Master Agreement) by and between the American Federation of Government Employees/National Veterans Council (Union or AFGE), and the VA was approved, signed, and effectuated. (Attachment D). The 2011 VA-AFGE Master Agreement includes Article 53, *Clinical Research*. (Attachment E).

On December 15, 2017, the VA provided notification to the Union to "reopen and renegotiate the 2011 VA-AFGE Master Agreement." (Attachment F).

On May 2, 2019, the VA and AFGE Master Agreement bargaining teams exchanged initial contract proposals in order to negotiate a successor VA-AFGE Master Agreement (Successor VA-AFGE Master Agreement). (Attachment G). In the exchanged proposals for Successor VA-AFGE Master Agreement, the Union included a proposal covering Article 53, *Clinical Research*. *Id.*

On September 10, 2019, Richard A. Stone, the Executive in Charge of VHA, submitted a Request for a 38 U.S.C. § 7422(b) determination by the VA Secretary on Article 53 in the 2011 VA-AFGE Master Agreement and the Successor VA-AFGE Master Agreement negotiations. (Attachment H).

¹ The employees described in 38 U.S.C. § 7421(b), Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors, are appointed under 38 U.S.C. § 7401(1).

AUTHORITY

The VA Secretary has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

- (1) Whether Article 53, *Clinical Research*, of the 2011 VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence and/or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review of any other agency pursuant to 38 U.S.C. § 7422(d).
- (2) Whether the Union's contract proposal for Article 53, *Clinical Research*, which the Union submitted to VA during the collective bargaining negotiations over a Successor VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence and/or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a) and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. §§ 7422(b), (d). "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Article 53, *Clinical Research*, of the 2011 VA-AFGE Master Agreement states that:

- A. The parties recognize the benefits of participation in clinical research projects.

- B. The Union will be notified prior to implementation of any clinical research that impacts working conditions of bargaining unit employees.
- C. Participation in research projects will be voluntary, consistent with staff rights/policy and the Department's right to assign work. Employees will receive training and written instructions regarding the intent and requirements of the research project prior to implementation.
- D. Staff involved in clinical research may be recognized for their participation/contribution to the project by the annual performance evaluation and other means; for example monetary awards, acknowledgment in papers.

(Attachment E).

The Union's May 2, 2019, proposal covering Article 53, *Clinical Research*, for the Successor VA-AFGE Master Agreement is substantively identical to Article 53, *Clinical Research*, in the 2011 VA-AFGE Master Agreement.² (Attachment G).

Professional Conduct and Competence

Article 53 of the 2011 VA-AFGE Master Agreement and the Union's proposal for Article 53 in the Successor VA-AFGE Master Agreement cover matters concerning or arising out of professional conduct or competence.

For more than 90 years, the VA Research and Development program has been improving the lives of Veterans and all Americans through health care discovery and innovation. (Attachment I). The Mission of VA Research, in relevant part, is to "improve Veterans' health and well-being via basic, translational, clinical, health services, and rehabilitative research; [and] to apply scientific knowledge to develop effective individualized care solutions for Veterans." *Id.* The VA's research process "starts with a tight focus on the everyday health needs and concerns of Veterans... Solutions are identified and developed through careful, rigorous research...[and] then applied to patient care, or translated into new or improved programs, as rapidly as possible...Thousands of VA patients volunteer each year to participate in VA research studies, both to address their own health challenges and to help their fellow Veterans, now and in the future." *Id.*

² The Union's proposal removed language regarding the Department's right to assign work and added that awards would be available for staff "involved in voluntary clinical research." (Attachment G) (emphasis in original).

The Secretary has previously determined that changes to the allocation of medical providers' time or their assignments intended to improve patient care directly involves matters of professional conduct and competence. In Harry S. Truman Memorial Veterans Hospital, the Secretary found that decreasing care providers administrative time was a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422. (Attachment J, Harry S. Truman Memorial Veterans Hospital (Oct. 28, 2016)). The decision noted, "the Secretary has repeatedly held that efforts to improve patient access to timely medical care by eliminating, modifying, or reducing administrative time are matters relating to direct patient care, a component of professional conduct or competence." *Id.* In VAMC Huntington, the Secretary found that nurses assignments were not negotiable as a matter of professional conduct and competence, quoting a prior decision that "Staffing and assignments of registered nurses based on clinical needs directly impact on the quality of patient care." (Attachment K, VAMC Huntingdon (Jan. 29, 2014) (quoting VAMC White River Junction (Jul. 7, 1984)). Similarly, assigning research duties to the medical providers identified in 38 U.S.C. § 7421(b) is related to direct patient care and is not subject to bargaining as a matter of professional conduct or competence. Clinical research is inextricably intertwined with direct patient care and clinical competence and is heavily relied upon to ensure the highest level of care for Veteran patients. The VA is committed to "lead[ing] the Nation in innovation, with VA research having contributed to the first liver transplant, development of the cardiac pacemaker, advancements in treatments for Post-Traumatic Stress Disorder, cutting-edge prosthetics, and many other medical breakthroughs." (Attachment A). This research is key to VA's Strategic Goals, as its "ground-breaking research [provides] Veterans cutting-edge treatment." *Id.*

Moreover, both the existing Article 53 and its proposed counterpart specifically reference the fact that research work is a consideration in the evaluation of medical provider's performance. (Attachment E ("Staff involved in clinical research may be recognized for their participation/contribution to the project by the annual performance evaluation and other means"); Attachment G). As noted in VAMC Ann Arbor, such issues related to the assessment of the competency of medical care providers is directly tied to providing quality patient care. (Attachment O, VAMC Ann Arbor, June 14, 2016)). The Secretary has "long held that proficiency reports are non-grieveable when they involve the substantive rating of an employee or clearly constitute an assessment of a provider's patient care duties," as the "proficiency rating system is the vehicle for evaluation of a [RN's] professional competence and conduct." (Attachment L, Phoenix VA Health Care System (Apr. 3, 2015)). Therefore, the impact of Article 53 in both the 2011 and Successor VA-AFGE Master Agreement on the performance evaluations of

medical care providers is impermissible and excluded from bargaining as an issue relating to professional competence and conduct.

Employee Compensation

38 U.S.C. § 7422(b)(3) specifically prohibits collective bargaining over matters that concern or arise out of the establishment, determination, or adjustment of employee compensation. Article 53, both in the 2011 and Successor VA-AFGE Master Agreements, directly relates to compensation of medical care providers, as Section D states: "Staff involved in clinical research may be recognized for their participation/ contribution to the project by the annual performance evaluation and other means; for example, monetary awards, acknowledgement in papers." (Attachment E; Attachment G). Such recognition in a performance evaluation may impact a providers' pay, as it may make them eligible for a superior performance award³ or performance pay.⁴ Notably, performance and incentive awards are considered to be a type of compensation. (Attachment M, VAMC Martinsburg (May 29, 2013) (performance awards constitute compensation under 38 U.S.C. § 7422)).⁵

The Secretary has previously determined that the criteria for physician performance awards is excluded from collective bargaining by 38 U.S.C. § 7422. In VAMC North Texas, the Union filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) over VA's failure to bargain over changes to the criteria for physician performance awards. (Attachment N, VAMC North Texas (March 15, 2018)). The Secretary determined that the criteria used for physician performance awards was an issue involving a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and was thus excluded from collective bargaining. *Id.* Similarly, the inclusion of language in Article 53 to add research work as a criterion for performance or incentive awards is improper because awards are a form of compensation, which is a non-negotiable issue pursuant to 38 U.S.C. § 7422 (b)(3).

As is illustrated above, the subject matters covered by Article 53, *Clinical Research*, in both the 2011 and Successor VA-AFGE Master Agreement are inconsistent with the

³ VA Handbook 5017, Part I, ¶ 2(e), "Superior Performance Awards. A one-time cash award that may be granted to an employee at the conclusion of a performance rating cycle based on his/her rating of record. These awards apply to all title 5, title 38 and title 38 hybrid employee who are covered under VA's performance appraisal program or proficiency report system."

⁴ VA Handbook 5007, Part IX, ¶ 12, "The purpose of performance pay is to improve the overall quality of care and health care outcomes through the achievement of specific goals and objectives related to the clinical, academic, and research missions of the VA."

⁵ This decision notes that VA Handbook 5007, Part VII, Chapter 2 mandates that VA included incentive awards and performance-based cash awards when calculating annual aggregate compensation for all employees, and that OPM includes incentive awards and performance-based cash awards in its definition of aggregate compensation at 5 C.F.R. § 530.202.

collective bargaining exclusions in 38 U.S.C. § 7422(b) because they are matters or questions concerning or arising out of professional conduct and competence and/or employee compensation. As such matters are excluded from the collective bargaining rights of 38 U.S.C. § 7421(b) employees, the clinical research of such employees can be conducted without notifying the Union and/or initiating or completing bargaining with the Union, and is not subject to the requirements set forth in Article 53 of the 2011 VA-AFGE Master Agreement or any successor collective bargaining agreement.

RECOMMENDED DECISION

Article 53, *Clinical Research*, of the 2011 VA-AFGE Master Agreement concerns or arises out of professional conduct or competence and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

RW

Approved

Disapproved

The Article 53, *Clinical Research*, contract proposal submitted by the Union for the Successor VA-AFGE Master Agreement concerns or arises out of professional conduct or competence and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

RW

Approved

Disapproved

Robert L. Wilkie

Robert L. Wilkie
Secretary of Veterans Affairs

25 OCT 19

Date